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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE,

Plaintiff and Respondent,

v.

LUIS VARELA,

Defendant and Appellant.

D038389

(Super. Ct. No. SCN125960)

APPEAL from a judgment of the Superior Court of San Diego County, Dana M. Sabraw, Judge. Affirmed.

After the court denied a *Marsden* motion (*People v. Marsden* (1970) 2 Cal.3d 118), a jury convicted Luis Varela of carrying a loaded firearm on his person (Pen. Code, § 12031, subd. (a)(1)),<sup>1</sup> having a concealed weapon on his person (§ 12025, subd. (a)(2)), two counts of exhibiting a deadly weapon to a police officer to resist arrest while

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<sup>1</sup> All statutory references are to the Penal Code.

personally using a firearm (§§ 417.8, 1192.7, subd. (c)(8)), and resisting an executive officer while personally using a firearm (§§ 69, 120225.5, subd. (a)(1)). The court sentenced him to six years in prison: the two-year middle term for resisting an executive officer enhanced by the four-year middle term for personal use of a firearm. It imposed concurrent terms on the remaining convictions. Varela contends the trial court committed reversible error in including CALJIC No. 17.41.1 in instructions to the jury.

### FACTS

On the evening of March 7, 2001, Oceanside Police Officers Novak and Dumas responded to reported gunshots and a fight. They detained Varela and a companion who matched the description of those involved in the fight. When Officer Dumas began to patdown Varela, Varela attempted to pull away and flee. A scuffle between Varela and the officers ensued. Varela removed a loaded gun from his pocket. Eventually officers subdued Varela.

### DISCUSSION

CALJIC No. 17.41.1 provides:

"The integrity of a trial requires that jurors, at all times during their deliberations, conduct themselves as required by these instructions. Accordingly, should it occur that any juror refuses to deliberate or expresses an intention to disregard the law or to decide the case based on penalty or punishment, or any other improper basis, it is the obligation of the other jurors to immediately advise the court of the situation."

Varela argues the instruction interferes with jury deliberations in that it limits free expression and gives the majority leverage over hold-out jurors, interferes with jurors' independent judgment, and infringes on the power of nullification.

Varela's claim that CALJIC No. 17.41.1 interferes with the jury's decision-making power by giving leverage to the majority and interfering with the jurors' free speech is pure speculation. The instructions here correctly advised the jury of its duty to decide the case based on the evidence presented at trial and the law as instructed by the court. (See *People v. Baca* (1996) 48 Cal.App.4th 1703, 1706-1708.) The trial court did not interfere with the jury's power and duty to make factual findings and apply the relevant law. Nor did CALJIC No. 17.41.1 infringe on Varela's right to have each juror make an independent judgment. In addition to CALJIC No. 17.41.1, the court instructed the jury with CALJIC 17.40:

"The People and the defendant are entitled to the individual opinion of each juror.

"Each of you must consider the evidence for the purpose of reaching a verdict if you can do so. Each of you must decide the case for yourself, but should do so only after discussing the evidence and instructions with the other jurors.

"Do not hesitate to change an opinion if you are convinced it is wrong. However, do not decide any question in a particular way because a majority of the jurors, or any of them, favor that decision.

"Do not decide any issue in this case by the flip of a coin, or by any other chance determination."

We assume the jury followed the instructions in their entirety. (*People v. Benson* (1990) 52 Cal.3d 754, 793; *People v. Patterson* (1979) 88 Cal.App.3d 742, 753.)

Varela argues the instruction interferes with the jury's power of nullification.

"While the notion of nullification has been embraced by some writers [citations], it has virtually no support in modern American precedent . . . . [¶] Juries have had the naked power to 'nullify' for over 300 years . . . . But while 'jurors may have the power to ignore the law . . . their duty is to apply the law as interpreted by the court. . . .' . . . [¶] The California cases, while recognizing the jury's 'undisputed power' to acquit regardless of the evidence of guilt, reject suggestions that the jury be informed of the power, much less invited to use it." (*People v. Baca, supra*, 48 Cal.App.4th at p. 1707.)

In *People v. Dillon* (1983) 34 Cal.3d 441 the court replied to Justice Kaus's concurring opinion in favor of jury nullification, and said:

"The separate opinion of Justice Kaus . . . -- whether described as nullification or civil disobedience -- impliedly reopens the classic debate as to whether society has created courts of law or courts of justice. Whatever the results of that exercise, it cannot seriously be urged that, when asked by the jurors, a trial judge must advise them, 'I have instructed you on the law applicable to this case. Follow it or ignore it, as you choose.' Such advice may achieve pragmatic justice in isolated instances, but we suggest the more likely result is anarchy." (*Id.* at pp. 487-488, fn. 39.)

We agree. In fact, in *People v. Williams* (2001) 25 Cal.4th 441, 463, the Supreme Court said, "jury nullification is contrary to our ideal of equal justice for all." It is misconduct for the jury not to follow the applicable law. CALJIC No. 17.41.1 does no more than instruct the jury to advise the court of such misconduct.

In any event, even if instructional error occurred, reversal is required only if it is probable the defendant would have obtained a more favorable result absent the error. (*People v. Breverman* (1998) 19 Cal.4th 142, 149.) Here, the jury was properly instructed it had a duty to follow the law as instructed and decide the facts solely on the

basis of evidence presented at trial. It is presumed the jury followed these instructions. (*People v. Ryan* (1981) 116 Cal.App.3d 168, 179.) Varela can only speculate that the jury would have exercised its power of nullification in his favor had the court not given CALJIC No. 17.41.1. Nothing in the record supports this speculation. Nor is it reasonably probable the jury would have returned a verdict more favorable to Varela had the court not given CALJIC No. 17.41.1. If CALJIC No. 17.41.1 is improper, error in giving it was harmless.

DISPOSITION

The judgment is affirmed.

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O'ROURKE, J.

WE CONCUR:

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KREMER, P. J.

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HUFFMAN, J.